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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF TENNESSEE, *Et al.*,
Petitioners,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Et al.,
Respondents.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Congress have the authority to exercise its power under the Commerce Clause (U.S. Constitution, Art. I, Sec. 8, Cl. 3), as limited by the Tenth Amendment, to supersede fundamental state governmental decisions in devising reasonable property taxation systems where those systems merely "affect" interstate commerce?

2. Was the congressional action in enacting Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 so as to displace a State's reasonable property tax classification system uniformly applicable to interstate and intrastate commerce arbitrary, inappropriate and without rational basis?

3. Do the provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503) abrogate Tennessee's property tax classification system embodied in the constitution and statutes of Tennessee with respect to rail transportation property subject to property taxation in Tennessee, and require the assessment and taxation of rail transportation property at levels or in manners other than those prescribed by Tennessee law?

4. If valid, is Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 applicable to the assessment and taxation of rail transportation property in Tennessee for the 1979 tax year?

PARTIES

1. Petitioners are the State of Tennessee, the Public Service Commission of Tennessee; the Honorable Frank D. Cochran, the Honorable Z. D. Atkins, and the Honorable Keith Bissell, Members of the Public Service Commission of Tennessee; the State Board of Equalization of Tennessee; the Honorable Lamar Alexander, the Honorable Gentry Crowell, the Honorable Harlan Mathews, the Honorable Bob Tollett, the Honorable William R. Snodgrass, the Honorable David Walker, and the Honorable Bernice Crain, Members of the State Board of Equalization of Tennessee; and the Metropolitan Government of Nashville and Davidson County, Tennessee.

2. Respondents are the Louisville and Nasvhille Railroad Company; Clinchfield Railroad Company; Southern Railway Company; Alabama Great Southern Railroad Company; Central of Georgia Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; Tennessee, Alabama and Georgia Railway Company; Tennessee Railway Company; Illinois Central Gulf Railroad Company; Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company; East Tennessee and Western North Carolina Railroad Company; Corinth and Counce Railroad Company; St. Louis Southwestern Railway Company; Chattanooga Station Company; Arkansas and Memphis Railway Bridge and Terminal Company; Chicago Rock Island and Pacific Railroad Company; and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Tennessee, on behalf of the State of Tennessee and the State Board of Equalization of the State of Tennessee, the General Counsel on behalf of the Public Service Commission of Tennessee, and the Metropolitan Legal Department on behalf of the Metropolitan Government of Nashville and Davidson County, Tennessee, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth Circuit was rendered on March 20, 1981, as attached hereto as *Appendix A*.

The reported opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, by the

Honorable Thomas A. Wiseman, Jr., presiding, is reported at *State of Tennessee* v. *Louisville and Nashville Railroad Company*, 478 F. Supp. 199 (M.D. Tenn. 1979).

JURISDICTION

The judgment of the Court below was entered on March 20, 1981. This petition is timely filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution

2. The Tenth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. 49 U.S.C. § 11503 [Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976]

5. Article II, Section 28 of the Tennessee State Constitution.

6. Tennessee Code Annotated §§ 67-601, 67-603, 67-901 and 67-902.

STATEMENT OF THE CASE

On January 19, 1979, the petitioners filed a complaint in the United States District Court for the Middle District of Tennessee based upon jurisdictional grounds under 28 U.S.C. § 1331 and 28 U.S.C. § 1337 seeking a declaratory judgment to determine the extent and constitutional validity of any limitations contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503), hereinafter referred to as the "4R Act," on the State of Tennessee, its agencies and its

political subdivisions in establishing, administering, carrying out or utilizing Tennessee's system of property taxation, particularly as it relates to the taxation of railroad property. Named as defendants were each of the interstate railroad companies operating into or through the State of Tennessee subject to the rules and regulations of the Interstate Commerce Commission and the laws of the State of Tennessee. On May 22, 1979, the United States of America moved to intervene and was made a party defendant for the purposes of defending the constitutionality of Section 306 of the 4R Act.

Under the provisions contained in Article II, Section 28 of the Tennessee State Constitution, Tenessee has established a property tax classification system. See Appendix C. For property tax purposes, the Tennessee Constitution requires property to be classified into three classes - real property, tangible personal property, and intangible personal property. The Tennessee Constitution further requires real property to be classified into public utility property, industrial and commercial property, residential property and farm property. Such subclassifications are assessed for property tax purposes at 55%, 40%, 25% and 25% of value, respectively. Tangible personal property is also sub-classified into public utility property, industrial and commercial property, and all other tangible personal property. This sub-classification is then assessed at 55%, 30% and 5% of value, respectively. The previously stated assessment ratios are specifically prescribed for each of the subclasses of property, and the Tennessee Legislature is empowered to provide the definition of property to be included in each class or subclass.

Pursuant to the constitutional mandate under Article II, Section 28 of the Tennessee Constitution, the Tennessee Legislature enacted a statute, T.C.A. § 67-601 [See Appendix D], providing definitions for property tax classification purposes. The Legislature defined the public utility property subclass as including the property of railroad companies. It also included in

the public utility property subclass the property of other carriers and transportation companies, including the following: telephone, radio common carriers and telegraph companies; passenger, sleeping, freight and private car companies; street car companies; power companies; express companies; pipeline companies; gas companies; electric light companies; water and/or sewerage companies; motor bus and/or truck companies; taxi cab, transit and limousine companies; commercial air carriers; and water transportation carriers. Such classification of railroad companies in the public utility property subclassification, rather than in the industrial and commercial property subclassification, was held to be in accord with the Fourteenth Amendment to the United States Constitution. *Louisville and Nashville Railroad Company* v. *Atkins,* 390 F. Supp. 576 (M.D. Tenn. 1975).

Under Tennessee statutes, the operating properties of railroad companies and other properties in Tennessee's "public utility property" classification are centrally assessed by the Public Service Commission using the unit rule of appraisal. T.C.A. §§ 67-901, 67-902. [See Appendix D] All other properties are locally assessed by local assessors of property.

On February 5, 1976, Congress enacted the 4 R Act (P.L. No. 94-210, 90 Stat. 54) [See Appendix D] under the ostensible authority of the Commerce Clause. In a part of this Act, specifically Section 306 thereof, Congress purported to regulate and control the governmental functions of the several states and their political subdivisions in matters of property taxation by directing the manner and mode of the assessment and taxation of "transportation property", "transportation property" being limited by definition to railroad property and property owned by the National Railroad Passenger Corporation. The principal features of Section 306 of the 4R Act are as follows:

1. It prohibited, as an unreasonable and unjust discrimination and an undue burden on interstate

commerce, the following acts by a state or political subdivision of the state.

a. The assessment for property tax purposes of railroad property at a value which bears a higher ratio to true market value than the ratio of assessed value to true market value of all other commercial and industrial property.

b. The levy or collection of any tax on an assessment which is unlawful under the act.

c. The levy or collection of any ad valorem property tax on railroad property at a tax rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction.

d. The imposition of any other tax which results in discriminatory treatment of a railroad.

2. It provided a federal remedy for violations of the provisions of the Act.

3. It provided for a five percent (5%) margin of leeway and ratio before federal relief under the Act could be granted.

4. It provided that the burden of proof with respect to the determination of assessed value and true market value would be that declared by applicable state law.

5. It provided that the provisions of § 306 would not become effective until three (3) years from the date of enactment.

6. It provided a definitional paragraph specifically defining key terms used in the section.

The enactment of Section 306 on February 5, 1976, as a part of the 4R Act, represented the culmination of an effort by the

railroads to obtain federal legislation regulating state taxation of railroads with a view toward barring state tax policies and practices perceived as discriminatory against railroads.

The petitioners projected that if Section 306 of the 4R Act operated to displace Tennessee's property tax classification of railroad property as "public utility property," there would be a statewide annual property tax revenue loss, using 1978 tax rates, of $3,257,800.00. Petitioner Metropolitan Government of Nashville and Davidson County projected an annual property tax revenue loss, using 1978 tax rates, of $223,210.00.

From an order dated August 15, 1979, the United States District Court for the Middle District of Tennessee, the Honorable Tom A. Wiseman, Jr., presiding, ordered and declared that 49 U.S.C. § 11503 (Section 306 of the Railroad Revitalization and Regulatory Act of 1976) was constitutional, overrode Tennessee law to the extent that it was inconsistent therewith, and applied to the 1979 Tennessee tax year. In this order the District Court enjoined the 1979 tax assessment of rail transportation property by the State of Tennessee at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of "commercial and industrial" classified property in the same assessment jurisdiction has to the true market value of "commercial and industrial" classified property.

By timely notice of appeal, the petitioners herein appealed the order of the District Court of August 15, 1979, to the United States Court of Appeals for the Sixth Circuit. On March 20, 1981, the United States Court of Appeals for the Sixth Circuit affirmed the orders of the District Court. In its order, the Sixth Circuit Court of Appeals affirmed the ruling that Tennessee's classification of railroad property for tax purposes was in direct conflict with the provisions of Section 306 and thus must give way; that Section 306 did not infringe upon Tennessee's taxing power in violation of the Tenth Amendment; and that Section

306 affects Tennessee's property tax assessments of the 1979 tax year. The Court of Appeals relied upon three other court decisions in its order: *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen,*[1] 640 F.2d 255 (10th Cir. 1981); *Atchison, Topeka & Santa Fe R.R. Co.* v. *State of Arizona,*[2] No. 78-655 (D.C. Ariz., filed Jan. 26, 1979) [See Appendix B]; *Great Southern R.R. Co.* v. *Eagerton,*[3] 472 F. Supp. 60 (M.D. Ala. 1979) *aff'd* 629 F.2d 1347 (5th Cir. 1980).

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[1] This case dealt only with a review of the district court's denial of the plaintiff railroads' motion for a preliminary injunction and did not address the merits of the case. Petitioners herein therefore feel this case inapplicable.

[2] This case is presently under advisement by the U.S. Court of Appeals for the Ninth Circuit, C.A. No. 79-3183. Petitioners would assert that the ruling of the District Court of Arizona on the 4R Act as applied to Arizona's property tax classification system is distinguished by a comparison of the Arizona and Tennessee statutes. Tennessee has four real property classifications with railroad property included as public utility property and assessed at 55% of value while commercial and industrial property, not included in the public utility classification, is assessed at 40% of value. Arizona on the other hand has seven real property classifications with railroads included within a narrowly defined class one and assessed at 60% of value while commercial and industrial property in general is included within class three and assessed at 27% of value. A.R.S. § 42-136. The assessment on railroads vis-a-vis commercial and industrial property in general is much higher in Arizona.

[3] This case dealt only with the issue of which tax year in Alabama the 4R Act had first application and did not address the remaining issues raised by petitioners herein.

REASONS FOR GRANTING THE PETITION

I.

The Mode And Structure Of The State Taxing System Is An Integral Function Of State Government As Protected By The Tenth Amendment Under The Authority Of The *National League Of Cities* v. *Usery*.

This case presents the important and fundamental question of a State's sovereignty and dignity within the federal system as it relates to the ability of the State to set and impose a reasonable tax system without the dictates or intervention of the federal Congress.

It is well established that Congress has broad power under the Commerce Clause to regulate commerce among the states *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824). However, the congressional exercise of power under the Commerce Clause is not without limitation when it confronts other constitutional provisions. *E.g. Leary* v. *United States*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969); *United States* v. *Jackson*, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968).

Furthermore, under the Commerce Clause, Congress has the right to regulate commerce among the states but this is not an unfettered right, but is subject to the attributes of sovereignty retained by the states under the Tenth Amendment.

In *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), the United States Supreme Court determined that the Tenth Amendment was a limitation on the congressional exercise of power under the Commerce Clause. Quoting from *Fry* v. *United States*, 421 U.S. 542, 44 L.Ed.2d 363, 95 S.Ct. (1975), the Court, speaking through Mr. Justice Rehnquist, said:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not

been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system." 96 S.Ct. at 2470.

The Court went on to develop this idea as follows:

"It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority of that matter." 96 S.Ct. at 2471.

The Court further said:

"But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce . . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 96 S.Ct. at 2475-2476

In applying these principles, the Court struck down as an unconstitutional exercise of congressional power under the Commerce Clause, the extension of the Fair Labor Standards Act to employees of states and their political subdivisions. The Court held that

> "[I]nsofar as the challenged amendments [to the Fair Labor Standards Act] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted to Congress by Art. I, § 8, cl. 3." 96 S.Ct. at 2474

The power to tax, particularly the power to tax property located within its boundaries, is an essential and basic attribute of state sovereignty and it is a traditional function central to the raising of revenue to provide for the performance of basic governmental services. *See, Nathan* v. *Louisiana,* 8 How. (49 U.S.) 73 (1850); A. Hamilton, *The Federalist,* No. 33 (J. Cooke Ed. 1961). Such power to tax is limited only if in substance and effect it constitutes the exertion of a different and forbidden power. *Bold* v. *Barrett,* 344 U.S. 583, 97 L.Ed. 567, 73 S.Ct. 468 (1953).

The constitutional limitations upon the State's power to tax are contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the prohibition of taxing interstate commerce under the Commerce Clause, Article I, Section 8, Clause 3. Tennessee's system of taxing railroads has been contitutionally upheld in *Louisville and Nashville Railroad Co.* v. *Atkins,* 390 F. Supp. 576, 579 (M.D. Tenn. 1974). *Also see, Nashville C & St. L. Ry. Co.* v. *Browning,* 310 U.S. 362, 82 L.Ed. 1254, 60 S.Ct. 968 (1940). There have been no allegations in this case that Tennessee is taxing interstate commerce since it only seeks to tax railroad property located within the jurisdictional boundaries of the state.

The power and structure of the state taxing system is an integral function of state government as protected by the Tenth Amendment and would come within the "one dimensional state interest test" applied by the Supreme Court in *National League of Cities* v. *Usery, supra, i.e.,* whether on its face a particular activity is "an integral function of state government."

However, the District Court discarded the "one dimensional state interest test" of the plurality decision in *National League of Cities* v. *Usery, supra,* and applied the balancing of federal and state interest approach deemed by the District Court to be implicit in *National League of Cities.* In applying this balancing approach, however, the District Court concluded that Congress' effort to revitalize the railroad industry overrides the state's interest in maintaining a property tax classification system, basing this conclusion on the premise that Congress, in Section 306, did not directly dictate to the states how essential decisions concerning integral governmental functions should be made because the States were free to collect the same amount of revenue by other means.

By its application of a balancing approach, the District Court, and as affirmed by the Court of Appeals, failed to place in the balance the States' interest in sovereignty and the federal system in general. Rather, the District Court apparently omitted these factors from the balancing process and assumed that because Congress had under the Commerce Clause acted to "revitalize" a private industry, it automatically outweighed the State's sovereign right to maintain a reasonable property tax classification system. Although arguably the States may be free to collect revenue by means other than a classified property tax system, they have an interest in maintaining the policy choices embodied in reasonable tax systems. These policies should not be automatically overriden by Congress in revitalizing a segment of private industry because Congress, too, is free to choose less intrusive means of accomplishing this purpose. The petitioners maintain that at a minimum the *National League of Cities* decision requires the principles of state sovereignty and federalism to be placed in the balance on the side of the States in applying a balance of interests approach.

If Congress can regulate through the Commerce Clause the States' activities merely "affecting" interstate commerce, virtually every governmental activity of the States may be

regulated. Taxes are the life-blood of a state. If Congress has the power to say how the States can tax property clearly within the States' jurisdiction and nexus, Congress has the power to destroy the States. If the State's taxing power is assumed by the Commerce Clause, the State is emasculated and superfluous becoming functionally a gutted shell. The petitioner would submit that using the rationale of the *National League of Cities* case, Congress, by Section 306, has encroached upon the basic sovereignty guaranteed the States under the Tenth Amendment.

II.

The Congressional Action Of Enacting Section 306 Of The 4R Act Was Arbitrary, Inappropriate And Without Rational Basis To Support Its Encroachment Upon The Sovereignty Of The State.

In enacting Section 306 of the 4R Act, Congress simply declared certain taxing actions by a state or political subdivision of a state "to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Such a de facto announcement that certain actions constitute an unreasonable and unjust discrimination against and an undue burden on interstate commerce is arbitrary and unreasonable and without rational basis. For Congress to declare that a reasonable ad valorem property tax system which does not discriminate between interstate and intrastate commerce nor discriminate nor unduly burden interstate commerce is arbitrary and without rational basis is in and of itself arbitrary and without rational basis. In *Hewlett - Packard Co.* v. *Barnes,* 425 F. Supp. 1294 (N.D. Cal. 1977), it was noted that constitutionality of federal legislation under the Commerce Clause is determined by a two-part test: (1) Congress must have a rational basis to find that the regulated activity affects interstate commerce, and (2) must select a means of regulation reasonable and appropriate to achieve that end.

Congress has seemed to equate property classification distinctions between classes of property within a States' classification system and interstate commerce burdens and discriminations. Congress has arbitrarily elevated intrastate property tax classifications to interstate burdens and discrminations even though intrastate and interstate commerce may be treated the same way under the tax system. Under this application, a state with a prohibited classification system under Section 306 is deemd, without more, to have discriminated against and unduly burdened interstate commerce notwithstanding whether or not rail transportation property and assessment ratios under that classification system, when compared to those of other states, reflect greater or lesser assessment ratio applications. Thus even though Tennessee's system treats interstate and intrastate commerce alike, it classifies rail transportation property in the same manner as other carriers and transportation property, and implies an assessment ratio well within the range of ratios employed in other states, its system is deemed by Section 306 to be discrminatory and unduly burdensome on interstate commerce. There appears to be no rational basis for Congressional rescitation to this effect in Section 306 or for the District Court's observation that "it can be asserted with equal force that Tennessee's taxation of railroads at a higher rate than property within its commercial and industrial classification seriously impairs the flow of interstate commerce."

Even if the States' property tax classifications are deemd to "affect" interstate commerce in a broad economic sense, *McGoldrick* v. *Berwind - White Coal Mining Co.*, 309 U.S. 33, 84 L.Ed.2d 565, 60 S.Ct. 388 (1940), petitioners maintain that Section 306 does not represent a reasonable and appropriate means of revitalizing the railroad industry. As reflected in the proof, discriminatory property taxation is unsubstantial to the railroads to the point of being negligible in its economic impact on railroads nationally. Moreover, Section 306 does not represent a reasonable and appropriate means of regulation to ac-

complish the removal of discrimination in property taxation. Section 306 fails to distinguish between discrimination which occurs because of differences in tax policy and discrimination which results from the unequal application of the laws. Section 306 in and of itself actually legislates discrimination because it singles out rail transportation property for discriminatory tax treatment favorable to rail carriers and not available to other interstate contract and common carriers. Petitioners would adamantly submit to this Court that Congress in enacting Section 306 has selected a means of regulation which interferes seriously with the sovereign taxing powers of the state in order to achieve minimal and unsubstantial ends. Petitioners assert that such a means of regulation is neither reasonable nor appropriate.

III.

Both The District Court And The Court Of Appeals Have Misconstrued The Application Of The 4R Act Vis-A-Vis The Constitution Of The State Of Tennessee.

The federal Congress does not have the authority under the Commerce Clause as limited by the Tenth Amendment to supersede a fundamental and reasonable system to taxation in the State of Tennessee. The primary feature of Section 306 in the context of Tennessee's property tax classification system, is 49 U.S.C. § 11503(b)(1) which provides that a state or political subdivision of a state may not "assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property."

The term "commercial and industrial property" as used in Section 306 is defined in 49 U.S.C. § 11503(a)(4) as follows:

". . .property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted, to a commercial or industrial use and subject to a property tax levy."

The definition of "commercial and industrial property" under Section 306 is not synonymous with Tennessee's definition of "industrial and commercial property" as contained in T.C.A. § 67-601(8). [See Appendix D] Rather, "commercial and industrial property" under Section 306 is a much broader class of property than "industrial and commercial property" under Tennessee's definition of "public utility property." T.C.A. § 67-601(7). [See Appendix D] Thus, rail transportation property is not asessed at a higher ratio to true market value than the assessment of all other commercial and industrial property in the State of Tennessee. Much of the property defined in the 4R Act as "commercial and industrial property" would also include property presently classified as "public utility property" in Tennessee. Tennessee's classification system as provided in Article II, Section 28 of its constitution affords railroads equal tax treatment with other, but not all, commercial and industrial property. Equal tax treatment is afforded the railroads with, for example, telephone, radio common carriers, and telegraph companies, passenger, sleeping, freight and private car companies, pipeline companies, gas companies, electric light companies, water and sewerage companies, motor bus and truck companies, taxicab, transit, and limousine companies, commercial air carrier companies, water transportation carrier companies as set forth in T.C.A. § 67-601(7). The railroad industry is but one of many industries in the "public utility" classification.

Under the petitioners' interpretation of the application of the 4R Act, the railroads are assessed equally with "other commercial and industrial property" in the same assessment jurisdiction and most importantly gives it equal tax treatment with its competitors. However, under the District Court's and the Court of Appeals' interpretation of the application of the 4R Act, the

railroads are now favored in the application of the property tax in Tennessee over some of its very competitiors.

Such an interpretation as advanced by the petitioners would avoid any constitutional questions as set forth in the previous parts of this petition.

IV.

Section 306 Of The Railroad Revitalization And Regulatory Reform Act Of 1976 Does Not Act To Displace January 1 As The Assessment Date In Tennessee For The 1979 Tax Year.

Section 306 of the 4R Act provides that "the provisions of this section shall not become effective until 3 years after the date of enactment of this section." The 4R Act was established by law when it was signed by the President on February 5, 1976 Therefore, in accordance with its terms, Section 306 became effective on February 5, 1979.

Tennesse by T.C.A. § 67-603 has established that all assessments of real property and personal property are made annually and as of January 1 for the year to which the assessment applies. *See generally, Mid-State Baptist Hospital, inc.* v. *City of Nashville,* 211 Tenn. 599, 366 S.W.2d 769 (1973). The District Court, as affirmed by the Court of Appeals, however, found Section 306 of the 4R Act to be applicable to the 1979 Tennessee tax assessments by virtue of the doctrine of preemption.

The doctrine of preemption is applicable in three basic instances: (1) where an express preemption provision exists in the federal act, *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973); (2) where preemption may be implied because of a direct repugnance or conflict between the federal and state statutes such that the two acts cannot be reconciled or consistently stand together, *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10

L.Ed.2d 248, 83 S.Ct. 1310 (1963); and (3) where preemption may be implied because the state statutes stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, *Wray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 988 (1978).

The petitioners would respectively maintain to the Court that none of these basic instances exist with respect to Tennessee's "tax day" as established on January 1 by T.C.A. § 67-603. The federal act, contains no express declaration specifically preempting January 1 as the date of assessment in the State of Tennessee. There is no irreconcilable conflict between Section 306 and T.C.A. § 67-603 describing Tennessee's "tax day" as January 1. If the application of Section 306 is deemed to effect rail transportation property assessments in Tennessee on January 1, 1980, such an interpretation would avoid any conflict between Section 306 and T.C.A. § 67-603.

Because the effective date of Section 306 is directly dependent upon the timing of its passage by Congress and its signature by the President, there appears to be no congressional intent to make Section 306 applicable to any specific tax year. If Congress intended Section 306 to apply to a particular tax year, it could have employed simple and plain language to this effect.

As stated the object and purpose of Section 306 is to preclude disparate treatment between rail transportation property and other commercial and industrial property in state and local property taxation. It had no purpose or objective to set a day other than those prescribed by state law upon which tax rights and liabilities are to be determined. Section 306 was national legislation, purporting to place limits upon state and local taxation of rail transportation property in all states. Presumptively, Congress was aware of the diverse content of the property tax provisions of the several states. Yet Congress employed no language in Section 306 specifying a special uniform "tax day" with respect to the taxation of rail transportation property.

Moreover, T.C.A. § 67-603 setting January 1 as the "tax day" in Tennessee does not stand as an obstacle or affect at all the effective date of Section 306.

The petitioners would respectively submit to the Court that the District Court, as affirmed by the Court of Appeals, construed and applied the doctrine of preemption too broadly under the Supremacy Clause in that none of the traditional three tests as set forth by the Supreme Court were met with respect to this question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NO. 79-1515

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Tennessee, et al.,
Plaintiffs-Appellants,

v.

Louisville and Nashville Railroad Company, et al.,
Defendants-Appellees.

(Filed March 20, 1981)

Before: EDWARDS, Chief Judge; KENNEDY and Jones, Circuit Judges.

Plaintiffs sought a declaratory judgment to construe the application of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 26(c), to Tennessee's system of taxation of its railroad property and alternatively, to determine its constitutionality, if not construed as plaintiffs contend. Seciton 306 prohibits assessment of railroad property at a value which bears a higher ratio to true market value than the ratio utilized by the state in assessing other commercial and industrial property. It further prohibits the levy or collection of any *ad valorem* property tax on railroad property at a tax rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction. Tennessee classifies railroad property along with the property of other utilities, carriers and transportation companies as "public utility property" and assesses it at 55% of value. Other commercial and industrial property is classified and assessed at 40% of value for real property and 30% for personal property. The

State of Tennessee, its Public Service Commission, and State Board of Equalization, along with the Metropolitan Government of Nashville and Davidson County, claimed that Section 306 does not prohibit Tennessee's present property taxation scheme and, if it does, it violates the Tenth Amendment of the United States Constitution.

The District Court, per Judge Thomas A. Wiseman, Jr., disagreed, granting defendants' motion for summary judgment. Judge Wiseman found that Tennessee's classification of railroad property for tax purposes was in direct conflict with the provisions of Section 306 and thus must fall; that Section 306 does not infringe upon Tennessee's taxing powers in violation of the Tenth Amendment; and that Section 306 affects Tennessee's property tax assessments for the 1979 tax year. The Court concludes that the decision of the District court is correct and in accord with the decisions of other circuits. *Atchison, Topeka & Santa Fe Ry. Co., et al.* v. *Lennen,* No. 80-2299 (10th Cir., filed Jan. 23, 1981); *Arizona, et al.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.,* No. 78-655 (D.C. Ariz., filed Jan. 26, 1979); *Alabama Great Southern R.R. Co.* v. *Eagerton,* 472 F. Supp. 60 (M.D. Ala. 1979), *aff'd* 629 F.2d 1347 (5th Cir. 1980).

Accordingly, the judgment is affirmed for the reasons set forth in the opinion of the District Court entered August 15, 1979.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 78-655 Phx. WPC

State Of Arizona, *et al.*,
Plaintiffs,

vs.

Atchison, Topeka And Santa
Fe Railroad Co., *et al.*,
Defendants.

MEMORANDUM AND ORDER

The State of Arizona and the Arizona Department of Revenue (hereinafter "Arizona") seek a declaration that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306"), 49 U.S.C. & 26(c), either does not prohibit Arizona's present property taxation scheme or does violate the Tenth Amendment of the United States Constitution. The originally named defendants are two railroad companies, the Atchison, Topeka And Santa Fe Railroad Company ("Santa Fe") and the Southern Pacific Company ("Southern Pacific"). The United States Government has intervened as a party defendant subsequent to the filing of the complaint.

Arizona's present property taxation system divides property into six classes. See A.R.S. § 42-136. The assessed valuation of property varies from fifteen percent of the property's full cash value or market value to sixty percent of the property's full cash value. See A.R.S. § 42-227. All real and personal property of railroad and certain other property fall into class one. A.R.S. § 42-136(A)(1). Class one property is taxed at the highest assessed value rate, sixty percent of its full cash value. Section 306, however, reads:

(1) Notwithstanding the provisions of section 306(b) of this title, any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such state or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter.

49 U.S.C. § 26(c)(1).

Defendants Santa Fe and Southern Pacific and plaintiff Arizona have stipulated that under A.R.S. § 42-227(B)(1) the

transportation property of the defendant railroads is assessed at a ratio of assessed value to true market value which exceeds by at least five percent the average ratio of assessed value to true market value of all other commercial and industrial property and also at a higher ratio to the true market value of such transportation property than the average assessed value in all property in Arizona. The plaintiff has moved for summary judgment contending that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Each of the three defendants has responded by separately moving for summary judgment. The three primary issues of law raised by Arizona's motion and the defendants' cross-motions can be summarized as follows: (a) whether this Court has jurisdiction over an actual controversy; (b) whether section 306 applies to Arizona'a property taxation scheme; and, (c) whether section 306 is a constitutional exercise of Congressional power.

I. Jurisdiction

The question of jurisdiction involves two sub-issues: whether a basis for federal jurisdiction exists and whether the alleged controversy is ripe for adjudication. The Railroad Revitalization and Regulatory Reform Act provides in part:

> [T]he district courts of the United States shall have jurisdiction without regard to amount in controversy or citizenship of the parties, to grant . . . declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section except that —
>
> . . . .
>
> (b) the provisions of this section shall not become effective until 3 years after February 5, 1976.

49 U.S.C. § 26(c)(2)(b). Thus, the substantive right not to be discriminated against property tax-wise and the procedural right to vindicate that right in federal court does not become effective

until after February 5, 1979. Even if these rights were presently effective, Arizona presumably could not allege jurisdiction based on 49 U.S.C. § 26(c) as it is not seeking to prevent, restrain, or terminate any acts in violation of Section 306.

The plaintiffs, however, have alleged jurisdiction under 28 U.S.C. § 1331 and § 1337. Section 1331(a) grants district courts jurisdiction of all cases "aris[ing] under the Constitution, laws, or treaties of the United States" wherein the matter in controversy exceeds $10,000, while section 1337 confers on district courts jurisdiction of all cases "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Defendant Santa Fe has suggested that the plaintiffs case might not arise under the Constitution and laws of the United States. While it is true that a federal question must appear on the face of the complaint, and the federal question cannot be created by anticipating a defense that a defendant will raise, *Louisville & Nashville R.R. Co.* v. *Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), a declaratory judgment action seeking to establish the invalidity of a threatened claim based on federal law arises under federal law for purposes of establishing federal question jurisdiction. *Arden-Mayfair, Inc.* v. *Louart Corp.*, 434 F. Supp. 580, 584 (D. Del. 1977). *See also Tokyo Shibaura Elec. Co. Ltd.* v. *Zenith Radio Corp.*, 548 F.2d 88 (3d Cir. 1977) (plaintiff sought declaratory judgment of invalidity of patent). The rights of railroads based on section 306 provide the basis for a cause of action and are not merely a federal defense to a threatened proceeding based on state law. *Compare Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Comm.*, 465 F.2d 237 (3d Cir.), *cert. denied,* 410 U.S. 943 (1972) (federal district court did not have federal question jurisdiction in a declaratory judgment action when the federal issue would constitute only a defense to threatened state action). Moreover, Arizona seeks to declare section 306 unconstitutional under the Tenth Amendment, clearly a question arising under the Constitution and laws of the

United States. The complaint is distinguishable from that in *Gully* v. *First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), in that Arizona is not arguing that a federal law gives it the right to tax an entity which was found not to raise a federal question, but that federal law prohibits Congress from attempting to restrict its right to tax. The federal law in *Gully, supra*, was characterized as "renouncing a defense" of the taxpayer, while section 306 plainly creates a cause of action for the taxpayer, and the Tenth Amendment is argued by Arizona to provide a cause of action here. As the allegation by Arizona as to the amount in controversy has not been controverted, and as Section 306 obviously affects interstate commerce, jurisdiction based on either 28 U.S.C. § 1331 or § 1337 is sufficiently established.

Arizona also maintains that the action is ripe for adjudication and the defendants either concur or simply raise the question of ripeness without alleging that it is lacking here. For a federal court to grant declaratory relief, there must be an actual controversy presented for adjudication. 28 U.S.C. § 2201. What constitutes an actual controversy cannot be decided by applying a clear-cut rule. As Justice Murphy stated in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941):

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

That Section 306 will not become effective until February 5, 1979 does not mean that a judicial controversy based on Section 306 cannot now exist. *See, e.g., Blanchette* v. *Connecticut General Ins. Corp.*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."); *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (adjudication of the constitutionality of a public act prior to its effective date). Doubt of future contingencies should not automatically mean a controversy cannot be ripe for adjudication. Rather, "the practical likelihood that the contingencies will occur and that the controversy is a real one should be decisive in determining whether an actual controversy exists." 10 C. Wright & A. Miller, Fed. Prac. & Proc. § 2757 at 760 (1973). The probabilities that the Arizona legislature might change its property taxation scheme or that Congress might repeal Section 306 seem quite low. Since Section 306 was passed nearly three years ago neither legislative body has apparently considered any proposal that would avoid this controversy. The contingencies that Arizona will not collect the property tax as it now exists or that the defendant railroads will not protest the collection of such taxes based on Section 306 seem also quite improbable, especially in light of stipulated facts. Thus it is concluded that the controversy alleged here is ripe for adjudication.

II. Statutory Construction of Section 306

Section 306 provides that the ratio of assessed value to the true market value of railroad property cannot, in essence, be higher "than the ratio which the assessed value of all other commerical and industrial property in the same assessment jurisidiction bears to the true market value of all such other commercial and industrial property." 29 U.S.C. § 26(c)(1)(a). Arizona argues that the phrase "all other commercial and industrial

property" refers to a single category such that all property in this category is assessed at the same percentage of market value. However, the language of Section 306 does not expressly require that a property tax scheme divide commercial and industrial property only according to whether or not it is railroad property so that all commercial and industrial property that is not railroad property is assessed at the same percentage of market value. To so read Section 306 makes the application of the statute extremely narrow to the point of being meaningless.

Legislative history shows that the purpose of the Railroad Revitalization and Regulatory Reform Act was "to promote the revitalization of the railroad industry in the United States." 1976 U.S. Code, Cong. & Admin. News 14, 15. One of the major problems identified by Congress was the inadequate financial resources of the railroads to improve and modernize rail facilities. *Id.* The connection between inadequate financial resources and discriminatory taxation is not remote. Legislative history of proposals that were considered prior to the enactment of Section 306 and that closely mirror the language of Section 306 is insightful.

> The purpose of S. 2289 is to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of common and contract carrier transportation property.
>
> . . . .
>
> In the last 9 years, the railroads alone have been assessed more than $900 million in discriminatory taxes.
>
> . . . .
>
> The Department of Transportation [has] stated:
>
> > There is little question as to the existence of discriminatory property tax practices against railroads. . . . Since, generally, they are only remotely

> related to the economic performance of the carrier, property taxes have a regressive effect on the carriers financial posture and earnings which, because of intermodal competition, cannot always be passed along. Even when allowance is made for the real prospect that the states will find other ways to raise revenue from the carriers to offset revenue losses, enactment of S. 2289 would seem to be of positive benefit to the regulated surface transportation industry.

S. Rep. No. 91-630, 91st Cong. 1st Sess. 1, 3, 4 (1969). The Senate Report goes on to cite evidence of nineteen states in which there was material tax discrimination. The assessed value ratio averaged nearly 38 percent higher for railroad property than for all other property. Arizona was the third worst of the nineteen states analyzed. *Id.* at 5. It is thus not unreasonable to conclude that an intermediate purpose of Section 306 is to eliminate discriminatory property taxation. To adopt the narrow construction of Section 306 proposed by Arizona would certainly defeat that purpose because of the ease with which the application of Section 306 could be avoided.

Legislative history of earlier proposed legislation very similar to Section 306 also strongly suggests that the phrase "all other commercial and industrial property" should be read as all other commercial and industrial property in the aggregate, regardless of how particular types of commercial and industrial property are classified for tax assessment purposes.

> For simplicity, . . . the phrase "all other property in the taxing district" has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property.

S. Rep. No. 1483, 90th Cong. 2d Sess., Appendix C, at 23 (1967). Thus, based on the language of Section 306 and the legislative history cited and quoted, Arizona's narrow construction of Section 306 must be rejected.

III. Constitutionality of Section 306

Arizona argues that Section 306 infringes upon its taxing power in violation of the Tenth Amendment, citing *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), in particular. Arizona, however, misconstrues the impact of *National League of Cities* on the power of Congress under the Commerce Clause.

It cannot be disputed that Congress has a very broad power to regulate interstate commerce and those activities affecting interstate commerce. *See, e.g., Fry* v. *United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."); *Wickard* v. *Filburn*, 317 U.S. 111, 124-25, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942) ("Even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942) ("The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."); *Houston, E. & W. T. Ry.* v. *United States*, 234 U.S. 342, 352, 24 S.Ct. 833, 58 L.Ed. 1341 (1914) ("[I]t is Congress, and not the state, that is entitled to prescribe the final and dominant rule [an interstate matters], for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."); *Gibbons* v.

Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824) ("[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.").

The Supreme Court has indicated in dicta that the power of Congress under the Commerce Clause includes the power to control state taxation affecting interstate commerce. *See, e.g., State Board of Insurance* v. *Todd-Shipyards Corp.*, 370 U.S. 451, 456, 82 S.Ct. 1380, 1384, 8 L.Ed.2d 620 (1962) ("The power of Congress to grant protection to interstate commerce against state regulation or taxation [citations omitted] or to withhold it [citations omitted] is so complete that its ideas of policy should prevail."); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 679, 65 S.Ct. 870, 883, 89 L.Ed. 1252 (1945) ("Congress, through the commerce clause, possesses the . . . power of control of state taxation of all merchandise moving in interstate commerce or foreign commerce."); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 298, 64 S.Ct. 950, 953, 88 L.Ed. 1283 (1944) ("Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude the domiciliary State from authority which it otherwise would have because it is the domiciliary State."). Justice Jackson's concurring opinion in *Northwest Airlines, supra*, is noteworthy where he stated:

> Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so.

Id. at 303-04, 64 S.Ct. at 956.

Arizona cites three relatively old Supreme Court cases, *Nathan* v. *Louisiana*, 49 U.S. (8 How.) 3, 12 L.Ed. 992 (1850), *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 19 L.Ed. 101 (1868), and *Railway Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5, 21

L.Ed. 787 (1873), for the proposition that the power of taxation by a state cannot be impaired or abridged by any federal power under the Constitution. Those cases, however, did not involve any finding that a state tax was an undue burden on interstate commerce, and there was no Congressional legislation that clearly purported to preempt the state tax law in question. Moreover, the following recent statements by the Supreme Court subsequent to its decision in *National League of Cities, supra,* are inconsistent with the proposition that a state's power to tax is limitless:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all states to adhere to uniform [taxation] rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

Moorman Manufacturing Co. v. *Bair,* ____ U.S. ____, 98 S.Ct. 2340, 2347-48 (1978).

Of course, a state can regulate certain matters affecting interstate commerce, absent congressional preemption, if the burden on interstate commerce is not adjudicated to be excessive. *See, e.g., Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851). However, that certain state regulation is found not to unduly burden interstate commerce does not preclude Congress from preempting such regulation. *See generally, Southern Pacific Co.* v. *Arizona, supra,* 325 U.S. at 769, 65 S.Ct. at 1520 ("Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."). Thus, the argument made by Arizona that its property taxation

scheme was found not to be unconstitutional as an undue burden on interstate commerce in *Apache County* v. *Atchison, Topeka & Santa Fe R.R. Co.*, 106 Ariz. 356, 476 P.2d 657 (1970), (decided prior to enactment of the federal statute in question), is irrelevant. The reasoning of the Oregon Supreme Court in *Smith, Kline & French Lab.* v. *State Tax Comm'n*, 241 Ore. 50, 403 P.2d 375 (1965), appears both eminently sound and directly relevant to analyzing the power of Congress to enact Section 306. The Oregon Supreme Court stated in *Smith, Kline, supra:*

> A state can levy an income tax upon revenues derived from interstate commerce. This is not becauase such tax is in a different area than the congressional power "to regulate commerce"; it is because, in the absence of congressional action to the contrary, both the state and federal legislatures can legislate in this area. In the absence of congressional action to the contrary, the only restriction upon the states is judicially imposed,—state action must not *unduly* burden interstate commerce. Congress now has acted; its statute is contrary to the state action; the federal statute is valid and the state statute must yield.

241 Ore. at ____, 403 P.2d at 380.

Arizona has strongly urged that *National League of Cities, supra,* requires finding Section 306 unconstitutional because Congress does not have the authority under the Commerce Clause to enact such legislation. *National League of Cities* invalidated an amendment to the Fair Labor Standards Act that was to include most state and municipal employees within the scope of the minimum wage and hour provisions of the act. A plurality of the Court stated:

> We hold insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions,

> they are not within the authority granted by Congress by Art. I. § 8, cl. 3.

Id. at 852, 96 S.Ct. at 2474. Four justices dissented from the Court's opinion and Justice Blackmun concurred on the basis that the opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856, 96 S.Ct. at 2476. Lower federal courts have interpreted *National League of Cities* very narrowly. *See, e.g., Usery* v. *Dallas Independent School District,* 421 F. Supp. 111, 114 (N.D. Tex. 1976). The number of cases upholding the Equal Pay Act provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1), illustrate the markedly conservative application of the holding in *National League of Cities. See, e.g., House* v. *Stewart,* Civ. No. C-77-181-G (M.D. N.C. Jan. 6, 1977), *aff'd,* 577 F.2d 734 (4th Cir.), *cert. denied,* 47 U.S.L.W. 3368 (1978); *Usery* v. *Dallas Independent School District, supra.*

Assuming that state taxation is an integral governmental function, the concurring opinion of Justice Blackmun indicates an ad hoc balancing of federal and state interests is to be used in resolving whether federal legislation restricting state power is constitutional under the Commerce Clause. Eliminating or reducing discriminatory taxation of railroads to enhance the chances of revitalizing the railway industry is an important federal interest in that the railway industry is a very important component of the interstate commerce system. The problems of this industry appear to be susceptible to solution only on a national scale. On the other hand, the state's interest in obtaining tax revenues in a particular, discriminatory way is difficult to discern. It is important to note that Section 306 does not prevent the states from collecting the same amount of revenue as in the past by means other than a property tax scheme highly discriminatory to railroad companies. Restricting how a state

collects taxes, moreover, does not as directly or substantially affect the policy choices a state makes as does restricting how collected taxes are to be spent, which was involved in *National League of Cities*. Thus, it is concluded on balance that Section 306 does not force directly upon the states Congressional choices as to how essential decisions regarding the conduct of integral government functions are to be made.

Finally, in refusing to adopt the construction of Section 306 proposed by Arizona and in finding Section 306 constitutional, this Court is not assessing or levying any tax, which is prohibited by the holding in *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961). Therefore,

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendants' motions for summary judgment are granted.

3. Counsel for defendants will promptly submit a single form of judgment consistent with the foregoing and approved as to form only by counsel for plaintiffs.

DATED January 26, 1979.

United States District Judge

APPENDIX C

Art. I, Sec. 8, Cl. 3

Powers of Congress.— [1] The congress shall have power to . . .

. . .

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Tenth Amendment

Rights reserved to states or people.— The powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, Sec. 28. Taxable property—Valuation—Rates.—In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking

or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) percent of its value.

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities or Towns; provided, that such tax relief for the years 1973 through 1977 shall be not less than an amount equal to the State, County, and Municipal Taxes on Five Thousand ($5,000) Dollars worth of the full market value (or One Thousand Two Hundred Fifty ($1,250) Dollars of the assessed value) of property used for a residence by any taxpayer over sixty-five (65) years of age for a period of one (1) year prior to the date of assessment; provided further, that such relief shall not extend to persons having a

total annual income from all sources in excess of Four Thousand Eight Hundred ($4,800) Dollars.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed to thirty (30%) percent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) percent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and shall provide fair and equitable methods of apportionment of the value of same to this State for purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ration of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redemeeable or cash value of all of their outstanding shares of capital stock, policies of in-

surance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. The portion of a Merchant's Capital used in the purpose of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973. [As Amended; Adopted in Convention September 14, 1971; Approved at election August 3, 1972.]

APPENDIX D

49 U.S.C. § 11503

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court throught the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assess-

ment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1445.

67-601. Definitions.—For purposes of classification of property:

(1) "Real property" is hereby defined to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under § 67-612; or machinery and equipment affixed to realty (except as otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal.

(2) "Personal property" is hereby defined to include every species and character of property which is not classified as real property.

(3) "Tangible personal property" is hereby defined to include personal property such as goods, chattels, and other articles of value which are capable of manual or physical posssession, and certain machinery and equipment, separate and apart from any real property, and whose value is intrinsic to the article itself.

(4) "Commercial and industrial tangible personal property" is hereby defined to include personal property such as goods, chattels and other articles of value which are capable of manual or physical possession, and machinery and equipment which is (1) used essentially and principally for the commercial or industrial purposes or processes for which it is intended and (2) if affixed or attached to real property, can be detached without material injury to such real property.

(5) "All other tangible personal proeprty" is hereby defined to include all tangible personal property, including that used in agriculture, except public utility tangible personal property and commercial industrial tangible personal property.

(6) "Intangible personal property" is hereby defined to include personal proeprty such as money, any evidence of debt owed to a taxpayer, any evidence of ownership in a corporation or other business organization having multiple owners, and all other forms of property whose value is expressed in terms of what the property represents rather than its own intrinsic worth. intangible personal property shall include all personal property not defined as tangible personal property.

(7) "Public utility property" is hereby defined to include all property of every kind, whether owned or leased, and used, or held for use, directly or indirectly in the operation of a public utility, which shall include but not necessarily be limited to the following business entities, whether corporate or otherwise: (1) railroad companies; (2) telephone, radio common carriers and telegraph companies; (3) passenger, sleeping, freight and private car companies which is hereby defined as any business, other than a railroad company, which owns, uses, furnishes, leases, rents or operates to, from, through, in or across this state or any part thereof any kind of railroad car, including but not necessarily limited to, flat, tank, refrigerator, passenger, or similar type cars; (4) street car companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies; (11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) taxicab, transit and limousine companies; (13) commercial air carrier companies holding a cer-

tificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration, or any other federal or state regulatory agency; excepting those companies whose operations are solely chartered operations; and (14) water transportation carrier companies which operate boats and barges over the waterways of this state for hire and which hold a certificate of convenience and necessity as common carriers from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency.

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(9) "Residential property" is hereby defined to include all real property which is used, or held for use, for dwelling purposes and which contains not more than one rental unit. All real property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(10) "Farm property" is hereby defined to include all real property which is used, or held for use, in agriculture, including, but not limited to, growing crops, pastures, orchards, nurseries, plants, tree, timber, raising livestock or poultry, or the production of raw dairy products, and acreage used for recreational purposes by clubs.

(11) "Moveable structure" is hereby defined to include any mobile home or such other moveable structure which is constructed as a trailer or semitrailer and designed to either be towed

along the highways or to be parked off the highways, and which may be used, temporarily or permanently, as a residence, apartment, office, storehouse, warehouse or for any other commercial or industrial purpose; but shall not include self-propelled vehicles, sleeping and camping facilities attached to, or designed to be attached to, or drawn by a pick-up truck or an automobile, and which contains less than three hundred (300) square feet of inclosed space. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 467, §§ 2, 3.]

T.C.A. § 67-603

Assessment date. — All assessments of real property and of personal property shall be made annually and as of January 1 for the year to which the assessment applies unless otherwise provided for, except that for the year 1973 all assessments shall be made as of January 10th. [Acts 1973, ch. 226, § 6]

67-901. Assessment by public service commission — Companies included. — The Tennessee public service commission, hereinafter called the commission, is authorized and directed to assess for taxation, for state, county, and municipal purposes, all of the properties of every description, tangible and intangible, within the state, owned by and all personal property used and/or leased by the following named person hereinafter referred to as companies, namely: (1) railroad companies; (2) telephone, radio common carrier, and telegraph companies; (3) passenger, sleeping, freight, and private car companies which is hereby defined as any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in or across this state or any part thereof, any kind of railroad car including but not necessarily limited to flat, tank, refrigerator, passenger, or similar type car; (4) streetcar companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies;

(11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) commercial air carrier companies holding a certificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration or any other federal or state regulatory agency excepting those companies whose operations are solely chartered operations; and (13) water transportation carrier companies which operate boats and barges over the waterways of this state for hire, and which hold a certificate of convenience and necessity from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency. The commission shall assess all of said property annually as of the same date as other properties are assessed by law; provided, this chapter shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture or products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars. [Acts 1973, ch. 226, § 11; 1974 (Adj. S.), ch. 467, § 4.]

67-902. Basis of value and level of assessment.—The commission shall assess all operating property, real and personal, tangible and intangible, at fifty-five per cent (55%) of its value. The value shall be determined by the unit rule of appraisal where applicable. The "unit rule of appraisal" is defined as the appraisal of the property as a whole without geographical or functional division of the whole. The "unit" shall be defined as all operating property, tangible and intangible, owned and used and/or leased by the company as determined by the commission.

The commission shall assess all nonoperating property at its proper level according to the use and class of property into

which it may fall. Nonoperating property shall be appraised annually and valued as other locally assessed property. "Nonoperating property" shall be defined as that property not used in the operations of the company as determined by the commission. [Acts 1973, ch. 226, § 11.]